

Crisis Management:

*Preparing for the Day You
Hope Does Not Come*

Presented by:

Jason Resnick, Esq., Vice President & General Counsel, Western Growers
&
Kelly McMillin, Chief of Police, Salinas Police Department

PowerPoint and Handouts Prepared by:

Patrick S. Moody, Esq., Barsamian & Moody



Gantt v. Security USA, Inc.

- Gantt is a security guard – abused by her boyfriend, a guard at another company. Break-in attempt at her mother’s house, and threat to kill her if she did not drop charges.
- Protective order – no contact in person or by phone.
- Notified Security USA, who notified all supervisors to keep her inside at secure locations, so boyfriend could not get to her.
- Supervisor Claggett worked weekends with boyfriend. He told her he had beat Gantt up. Gantt had told her about the death threat, and she knew about the protective order. Despite that, she told the boyfriend “you all need to talk.”

Gantt v. Security USA, Inc.

- Boyfriend would call, and Claggett would urge Gantt to take the calls. Gantt reminded her about the protective order, but Claggett put a call through anyway.
- Gantt complained, and Claggett was admonished, but did it again a couple weeks later saying “all he wants to do is talk to you.”
- Finally, Claggett assigned Gantt to an unsecure outside post. Gantt refused, but Claggett yelled at her to go to the post. As soon as she got there, Claggett put a call from the boyfriend through. Gantt hung up and requested to be moved inside, but Claggett refused.

Gantt v. Security USA, Inc.

- Boyfriend comes and kidnaps Gantt at gunpoint. Two guards see it and report it to Claggett. She says not to report is because “he doesn’t want to hurt her, he just wants to talk to her.”
- Boyfriend holds Gantt for six hours, raping her, assaulting her, and threatening to kill her. Gantt convinces him to let her go by promising that she will get back with him, and tell the police she went willingly.
- 20 years in prison.
- Gantt sues Security USA, and gets \$2.5 million.

You have to take threats seriously

Aviles v. Cornell Forge

- Aviles filed EEOC complaint for national origin discrimination.
- Several days later, he is suspended but refuses to leave the premises. Has argument with supervisor, and threatens to kill himself and others with a gun. CF calls the police and has him removed.
- Later, an employee reports that Aviles is sitting in his car right outside the gate. Calls the police, who ask if he is armed (they knew he had made threats and had been escorted out). Employee said he did not know.
- Police show up in force and take him into custody. He is unarmed and said that he was just there to get his final paycheck.
- Aviles sues saying that having him arrested was retaliation for EEOC claim.

Aviles v. Cornell Forge

7th Circuit court said:

“If an employer had to face Title VII liability for truthfully reporting to the police that a disgruntled employee had threatened a supervisor and could be armed, we might discourage employers from taking the most prudent action to protect themselves and others in the workplace.”

but:

“If the employer knew Aviles was just there to pick up his check, and that he was unarmed, then there would be a basis for finding that Cornell Forge retaliated against Aviles.”

It is a tightrope, but courts understand that

History of “Workplace Violence”

- 1983 -1989: the phenomenon “**going postal**” enters the lexicon after a series of 40 workplace shootings by United States Postal Service workers
- 1998: lottery accountant in Connecticut killed four co-workers
- 1999: Xerox technician in Hawaii killed seven co-workers
- 2000: software engineer in Massachusetts killed seven co-workers
- 2001: forklift driver in Chicago killed four co-workers
- 2002: insurance executive in New York City killed three co-workers
- 2003: worker in Missouri killed three co-workers, and a worker at Lockheed - Martin in Mississippi killed six co-workers
- 2005: former ConAgra employee in Kansas shot four employees to death and wounded three others before killing himself
- Many more examples...

More Recent Examples

- 2012 – 49 year old woman allegedly shot and killed co-worker at an Arkansas plant. Suspect had complained to her supervisors of ongoing harassment by the victim.
- 2012 – Illinois man shoots co-worker 4 times with a revolver leaving victim critically wounded.

History of “Workplace Violence”

- United States Justice Department estimated that nearly 600,000 incidents of violence took place in workplaces across the country in 2009. This includes rape/sexual assault, robbery, and aggravated and simple assault.
- 7.8% of working U.S. adults were threatened, bullied, or harassed on the job in 2010.
- An average of 2 murders in the workplace a day from worker-on-worker violence, a statistic which has remained flat over 2 decades.
- There were 517 workplace homicides in 2008. In 2009, there were 521 workplace homicides.
- Employees cite safety and security as a top factor in job satisfaction

“General Duty” Clause of Occupation Safety and Health Act

- Section 5(a) of the Occupational Safety and Health Act, *29 USC 654*, requires that each employer:
 - (1) shall furnish to each of his employees employment and a place of employment which are **free from recognized hazards that are causing or are likely to cause death or serious physical harm** to his employees; and
 - (2) shall comply with occupational safety and health standards promulgated under this Act.

California Statutes Addressing Workplace Violence

- Labor Code section 6400(a): Every employer shall furnish employment and a place of employment that is **safe and healthful** for the employees therein.
- Labor Code section 6401: Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. **Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.**

California Statutes Addressing Workplace Violence

- Labor Code section 6402: No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.
- Labor Code section 6404: No employer shall occupy or maintain any place of employment that is not safe and healthful.

California Statutes Addressing Workplace Violence

- Labor Code section 6403: No employer shall fail or neglect to do any of the following:
 - a. To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.
 - b. To **adopt and use methods and processes** reasonably adequate to render the employment and place of employment safe.
 - c. **To do every other thing reasonably necessary to protect the life, safety, and health of employees.**

California Statutes Addressing Workplace Violence

- Code of Civil Procedure section 527.8(a): Any employer, whose employee has **suffered unlawful violence or a credible threat of violence** from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, **may seek a temporary restraining order and an injunction on behalf of the employee** and, at the discretion of the court, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer.
- *Copies of the forms to use in seeking an injunction under 527.8(a) start at pg. 40.)*

California Statutes Addressing Workplace Violence

- One California court has said that:
- **“Labor Code section 6400 et seq. and Code of Civil Procedure section 527.8, when read together, establish an explicit public policy requiring employers to provide a safe and secure workplace, including a requirement that an employer take reasonable steps to address credible threats of violence in the workplace.”**

California Statutes Addressing Workplace Violence

- On the other hand, another California court has said that there is:
- No “obligation to automatically fire any employee who makes a threat of violence regardless of the employee’s intent in uttering it and the actual risk to workplace safety,” however, the employer “might be required to summarily place an employee on administrative leave to fulfill its duty of providing a safe workplace where the [employer] has reasonable proof that an employee has made a credible threat of violence against a coworker....”

Tough spot for employers – what is a “credible threat of violence?”

Definition of “Credible Threat of Violence”

- Code of Civil Procedure section 527.8(b)(2) says it is a “**knowing and willful statement or course of conduct** that would place a **reasonable person in fear** for his or her safety, or the safety of his or her immediate family.”
- Penal Code section 139(c) says it is “a threat made with the **intent and apparent ability to carry out the threat** so as to make the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.”
- Penal Code section 646.9(g) says it is a **verbal or written threat** ... made with the intent ... and ...with the apparent ability to carry out the threat....”
- Penal Code section 76(c)(5) says it is a “**verbal or written threat or a threat implied by a pattern of conduct** or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat”

Three Key Questions

- The critical criteria that must be assessed and evaluated by the employer are:
 1. Has there been a **threat**?
 2. This can be either a verbal threat, a written threat, a threat implied by a course or pattern of conduct, or any combination.
 3. Does the person making the threat appear to have the **intent** to carry it out, **and** the **apparent ability** to do so?
 4. Would a **reasonable person be in fear** for his or her safety, or the safety of his or her family, based upon the threat?

Three Key Questions

- In order to properly address these questions, the employer will have to:
 - a. Conduct an appropriate investigation of the situation.
 - b. Interviewing any employees and any witnesses to obtain a full understanding of the facts.
 - c. Evaluate the facts in good faith, and furnish an answer to each of the questions above.
 - d. Communicate the results of the investigation to the affected employees.
 - e. Take appropriate action based upon the findings of the investigation. This includes imposing appropriate discipline, and may require seeking an appropriate restraining order.

Three Key Questions

- If the answer to the three questions is “Yes,” the employer **must**, by statute, “do every other thing reasonably necessary to protect the life, safety, and health of employees.”

Threat Assessment

- The goal of threat assessment is to review the credibility and viability of the threat; i.e., is this threat likely to be acted upon, or is it simply “blowing off steam.”
- The assessment should evaluate:
 1. The exact nature and context of the threat or threatening behavior;
 2. The target of the threat, if identifiable;
 3. The motivation behind the threat; and
 4. The apparent ability to carry out the threat.

Threat Assessment

- The assessment should allow the employer to preliminarily designate the threat as either something that requires immediate intervention:
- “I’ve got a gun in my locker and I’m ready to shoot Bob if he says one more thing” means you **call the police**;

or one that can be dealt with by less immediate measures:

- “Bob is really a jerk” means you can **try to find out why** he or she thinks Bob is a jerk.

Cal/OSHA's Response

- Cal/OSHA is required by California Labor Code section 6313(a):
- “To investigate all industrial accidents which are fatal to one or more employees or which result in a serious injury or illness or a serious exposure, unless the Division determines an investigation is unnecessary, in which case the Division shall summarize the facts indicating that the accident need not be investigated and the means by which the facts were determined.”

Cal/OSHA's Response

- Labor Code section 6302(h) excludes from the definition of serious injury or illness:
- "Any injury or illness or death caused by the commission of a Penal Code violation"

Cal/OSHA's Response

- Labor Code section 6313(b), however, provides that:
- The division may investigate the causes of any other industrial accident or occupational illness which occurs within the state in any employment or place of employment... and shall issue any orders necessary to eliminate the causes and prevent reoccurrence.
- Based on that, Cal/OSHA chooses to investigate workplace violence.

Cal/OSHA's Response

(An excerpt from Cal/OSHA's "Guidelines on Workplace Security" starts on p. 20)

- Cal/OSHA compliance personnel are instructed to, **at a minimum**, determine the answers to the following six questions:
 1. Is the inspected establishment one which is considered to be at significant risk of a Type I, II or III workplace violence event?
 2. What are the physical characteristics and the work practices of the establishment that affect the security of the employees who work in the establishment?
 3. Have assaults occurred in the establishment in the past? If so, how often have these assaults occurred and what was their severity?

Cal/OSHA's Response

4. What measures were taken by the employer to investigate the cause(s) of assault(s) and what corrective measures were taken by the employer to prevent other assaults?
5. What, if any, are the specific workplace security issues the employer's IIP Program should address?
6. If the employer is required to address workplace security issues through the IIP Program, how effective is the employer's IIP Program in identifying and correcting workplace security hazards and in investigating workplace assaults? Does the IIP Program result in effective communication, hazard assessment, hazard correction and supervisory and employee training.

Cal/OSHA's Response

- Certain employers are required by law to address workplace violence in their IIP Program, such as taxi companies, liquor stores, convenience stores, gas stations, hotels, jewelry stores and security companies.
- Other companies may be required to do so, however, if their employees are at risk of violence by virtue of their providing services to a client or customer, or where the employer has reason to believe that their employees might be at risk.
- Be cautious – address workplace violence in your IIP Program.
- Remember your “general duty”

Basic Types of Workplace Violence

- Most experts agree that workplace violence falls into one of four main categories:
- Type 1: Violence instigated by criminals who have no connection to the workplace, but who enter solely to commit a crime, such as a robbery, etc.;
- Type 2: Violence instigated by customers of the business, or others who are there for legitimate purposes;
- Type 3: Violence instigated by present or former employees; or
- Type 4: Violence instigated by someone who has an outside relationship with an employee.

Basic Types of Workplace Violence

- Type 1 violence is estimated to account for nearly **80 percent of all workplace homicides**, and is generally limited to a small group of particular occupations, such as taxi drivers, which is the job that carries the highest possibility of being murdered.
- Taxi drivers suffer nearly 27 homicides per 100,000 workers per year, while liquor store clerks, the job with the second highest homicide rate, suffer 8 homicides per 100,000 workers per year.

Formulating an Effective Workplace Violence Policy

1. There is **no one specific policy** that will work for every workplace.
2. All **employees must know** that the employer is serious about dealing with this issue, and management must be consistent in enforcing that belief.
3. **Management must take an active role** in being alert to potential violence or other issues, such as plant security, that need to be addressed before an act of violence occurs.
4. An effective workplace violence plan requires **ongoing evaluation and re-evaluation**, taking into account changes in the workplace, staff changes, etc.

Formulating an Effective Workplace Violence Policy

- Having a written workplace violence policy can go a long way toward helping to ease employee concerns, and toward enhancing the employees' ability to properly and effectively deal with a violent situation if one occurs. The policy should include:
 1. An **express prohibition** of violence, threats, bullying, harassment, etc., emphasizing the employer's commitment to a safe workplace (i.e. **zero tolerance**);
 2. A **reporting procedure** through which employees can report harassment, threats or violence. The reporting procedure should provide that the employer will promptly address each report, and will take each report seriously; and
 3. Some **mechanism for employees to offer suggestions** for improving security, whether via a "suggestion" box, or otherwise.

Pre-Employment Screening

- Such screening raises a number of issues, primarily dealing with the applicant's privacy, and with prior employers being forthcoming regarding the employee's history while at that employer.
- Waiver by applicant?
- Civil Code section 47(c) provides that conversations between a former employer and a prospective employer, regarding an employee's "job performance or qualifications," are privileged.
Defamation suit must show "malice"
- Failure to try can subject employers to potential liability for failing to fulfill the "general duty" under § 5 of the Occupational Safety and Health Act and/or California's Labor Code section 6400 et seq. Further, employers can also face liability under tort theories for negligent hiring and/or retention.

Short Sample Policy

(Full Cal-OSHA Model Policy at pg. 28)

- This company does not tolerate workplace violence. We define “workplace violence” as actions or words that endanger or harm other employees, or cause other employees to reasonably believe that they, or their immediate family members, are in danger. Such actions or words include, but are not limited to:
 - Verbal or physical harassment, bullying, etc.
 - Verbal or physical threats
 - Assault or other violence
 - Any other behavior that reasonably causes employees to feel threatened
- We encourage employees to report any workplace violence to your immediate supervisor, or to _____. We will conduct a prompt review of the situation, including investigating and documenting each situation, and issuing appropriate discipline where necessary.
- Employees have an obligation to avoid engaging in workplace violence, and to report such activity to management. Together, we can help to promote a safe work environment.

Early Warning Signs of Workplace Violence

Personal Factors

- Certain behavior can be seen as an indication of potential violence, including:
 - Specific threats
 - Increasing belligerence
 - Hypersensitivity to criticism
 - Fascination with weapons
 - Obsession with a co-worker or supervisor
 - Angry outbursts
 - Extreme disorganization
 - Homicidal or suicidal comments

Early Warning Signs of Workplace Violence

Workplace Factors

- A number of workplace issues that can lead to increased stress and/or frustration by employees, including:
 - Understaffing which leads to compulsory overtime
 - Poorly defined job tasks and/or responsibilities
 - Impending or recent downsizing or reorganization
 - Labor disputes, ongoing collective bargaining, strikes, etc.
 - High employee injury rates
 - Poor management style, such as arbitrary or unexplained orders, discipline in public, inconsistent enforcement or work rules, etc.

Early Warning Signs of Workplace Violence

Domestic Violence

- The following behavior may suggest possible domestic violence:
 - Unexplained tardiness or absences, or frequent unplanned leave
 - Unexplained changes in job performance, lack of concentration, anxiety
 - Disruptive phone calls or e-mail, or disruptive visits
 - Unexplained requests to be moved from public areas of the workplace
 - Unexplained injuries or bruises
 - Noticeable changes in make-up (to cover injuries/bruises)
 - Inappropriate clothing, such as sunglasses indoors, or a turtleneck sweater in summer

Emergency Action Plan

- Many (most) employers have no on-staff security officers who are trained to properly evaluate the employer's violence risk factors. Fortunately, there are professional security experts who will evaluate your facility and recommend changes to physical layout, evacuation routes, and other security measures. Likewise, there are psychologists and counselors who are trained to help employees deal with the aftermath of an incident of workplace violence.
- **Most local police departments and/or fire and emergency rescue personnel will have personnel on staff who can help with an assessment of your facility and help plan for potential violence.** Most agencies will even do so free of charge.
- Once an employer has consulted with the appropriate experts, whether in regard to physical plant security, or otherwise, it is imperative to put a plan into place and make certain that the employees are aware of the plan. The following is a list of items that should be addressed in each such plan:

Emergency Action Plan

- Ex-employee entered his former workplace in Visalia, California, where he tracked down and shot a former co-worker to death, then killed himself.
- Had not worked at the employer for approximately two years, but for some unknown reason had held a grudge against the co-worker for all that time.
- While originally designed with workplace violence in mind, it is obvious that these tips are equally applicable to many types of emergencies, whether fires, gas leaks, chemical spills, etc.

Emergency Action Plan

(Developed with Visalia Police Department)

- A designated employee should have a copy of the building floor plan(s) in a secure location **outside** of the building, either in a car, a lockbox, etc., so that the police/firefighter/rescue personnel can enter the building with advance knowledge of the layout.
- Make certain that at least one employee will have keys to all doors in the building, and that those keys will be available **outside** of the building in case of an emergency.
- Have designated employees responsible for knowing the location of all utility shut-off valves in their area, and how to operate the valves. Those valves should also appear on the floor plan(s).

Emergency Action Plan

(Developed with Visalia Police Department)

- Require all visitors to enter the premises through a designated entry point, and have them sign in and out. Never let visitors into the facility unescorted. Instruct employees to report any unescorted visitors to their supervisor.
- Require employees to have some form of company identification that is plainly visible.
- The employees should have a designated assembly area outside of the facility.
- There should be designated personnel who are responsible for knowing who is at work on any given day and who is absent. Those people should not be required to keep track of more than approximately 10-15 employees. Obviously, existing supervisors are ideal for this, but if a particular supervisor oversees more employees than that, the employees should be broken down into smaller groups with another person who is required to know who, in that smaller group, is present.

Emergency Action Plan

(Developed with Visalia Police Department)

- Designate a company official to make contact with arriving police, fire, or other emergency personnel. That person should be able to provide the building floor plan, the keys, and a report of any missing employees.
- Instruct employees that once they have gathered outside of the building, they should not discuss the facts, as the police may well want to interview them and get their version of what happened without that version being influenced by another employee's account.
- Take all threats seriously. If an employee says that he or she has been threatened, the employer must take reasonable steps to address the situation.
- Do a periodic security audit of the facility, with a view toward how people could get into the facility and how the employees would get out of the facility if need be. Most local police and fire departments have personnel who are trained to help with such an audit, and as mentioned above, will do so free of charge.

Emergency Action Plan

(Developed with Visalia Police Department)

- Once an employer has considered these items, and come up with an appropriate plan for the particular facility, **it is absolutely imperative to practice**, and to continue practicing the procedure on an ongoing basis. If the first time the employees attempt to evacuate the building is in the midst of an actual emergency, the likelihood of a successful evacuation is virtually non-existent. With some advance thought, planning and practice, however, an employer may well be able to help protect its employees in an emergency.

Practice, PRACTICE, **PRACTICE**

Related Issues

Workers' Comp Coverage

- California employers are specifically **required** to provide written notification to any employee who is the victim of a crime in the workplace that he or she is entitled to workers' compensation benefits for any resulting injuries, including psychological injuries.
- Such notice must be given **within one day** after the employer reasonably should have become aware of the crime.

Related Issues

Mandatory Time Off

- California employers with **25 or more employees** are prohibited from discriminating against any employee who takes time off when that person has been the victim of domestic violence or sexual assault, whether the violence or assault took place at work or otherwise. This includes time off:
 1. To seek medical attention for injuries caused by domestic violence or sexual assault;
 2. To obtain services form a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault;
 3. To obtain psychological counseling related to an experience of domestic violence or sexual assault; and
 4. To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation.

Related Issues

Mandatory Time Off

- All California employers, regardless of size, are required to grant employees who have been the victim of domestic violence or sexual assault time off to go to court, obtain restraining orders, “to help ensure the health, safety or welfare of the victim or his or her child.”

Questions?

Jason Resnick, Esq.,
Vice President and General Counsel
Western Growers
&
Kelly McMillin Chief of Police Salinas
Police Department